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IN THE

Supreme Court of the United States

OCTOBER TERM, 1995

AIRMAN FIRST CLASS ALDRICH C. MCCASTLE,
Petitioner

v.

UNITED STATES OF AMERICA,
Respondent

Petition for a Writ of Certiorari to the United States Court of Appeals for the Armed Forces

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PETITION FOR WRIT OF CERTIORARI

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30 pp

QUESTION PRESENTED

Does a Defense Counsel's failure to raise a valid motion to suppress a confession, which would have resulted in the sole charge being dismissed, constitute ineffective assistance of counsel.

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Airman First Class Aldrich C. McCastle, respectfully prays that a writ of certiorari issue to review the order and judgment of the United States Court of Appeals for the Armed Forces entered in his case on 1 March 1996.

OPINIONS BELOW

The order and judgment of the United States Court of Appeals for the Armed Forces, reported at 43 M.J. 438 (1996), is located at Appendix A. The opinion of the United States Air Force Court of Criminal Appeals reported at 40 M.J. 763 (AFCMR 1994), issued on 26 July 1994 is located at Appendix B.

JURISDICTION

The final order of the United States Court of Appeals for the Armed Forces was entered on 1 March 1996. The jurisdiction of this Court is invoked under 28 U.S.C.A. § 1259(3) (Supp. 1993) and 10 U.S.C.A. § 867(a) (Supp. 1993).

CONSTITUTIONAL PROVISIONS INVOLVED

The Fourth Amendment of the Constitution of the United States provides:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

The Sixth Amendment of the Constitution of the United States provides, in pertinent parts: "In all criminal prosecutions, the accused shall enjoy the right to . . . have Assistance of Counsel for his defense."

STATEMENT OF THE CASE

On January 1993, the appellant was tried by a special court-martial composed of a military judge sitting alone at Robins AFB, Georgia. Contrary to his pleas he was found guilty of wrongful use of cocaine. He was sentenced to a bad conduct discharge and reduction to airman basic.

On 16 November 1992 the appellant was ordered to submit to a commander directed urinalysis. The sample was ordered as a "result of severe financial problems being experienced by AIC McCastle." On either 2 or 3 December 1992 the Robins AFB hospital was notified that the urine sample submitted by the appellant was

positive for the presence of Benzolegonine, a cocaine metabolite. Having learned of the positive urinalysis result the Staff Judge Advocate notified the Air Force Office of Special Investigations that the appellant would be administratively discharged from the Air Force unless a confession was obtained by the AFOSI and corroborated. At 1119hrs on 4 December 1992 three agents with the AFOSI began an interview with the appellant. All three agents were present throughout the interview.

The appellant was advised at 1119hrs that he was suspected of use of a controlled substance. At 1121hrs the appellant indicated he understood his rights and that he did not want a lawyer and was prepared to talk. The agent's notes reflect that the appellant confessed to ". . . purchasing one rock of cocaine from the Ashley Arms hotel and subsequent use of crack" at 1130hrs.

The same interview notes indicate the following sequence of events occurred in the nine minutes between waiver of the rights and the confession. Quoting from the notes:

> —Subject initially denied any involvement in use of narcotics.
>
> —Subject advised he did not know how urinalysis could have come back positive.
>
> —Subject finally admitted to using crack cocaine on 14 November 1992. Subject remembers date was 2 days prior to piss test.
>
> —Subject advise he had fight with spouse and went for a ride feeling depressed.

The notes continue on to explain the specifics of the actual one time purchase and use of crack. Finally, the notes indicate the appellant "swore it was [the] first and only time he ever used crack."

Using the confession the petitioner was prosecuted for the use of cocaine. His defense counsel never made a

motion to suppress the confession on the grounds that the confession was the direct product of the commander directed urinalysis.[1] On appeal, the petitioner contended that his trial defense counsel was ineffective in not making a motion to suppress this only substantive piece of evidence that existed against the petitioner.

In resolving this issue adversely to appellant, the Air Force Court of Criminal Appeals concluded that the trial defense counsel failed to raise the suppression motion because the defense counsel simply failed to understand applicable legal precedent and that was insufficient to constitute ineffective assistance of counsel. The Air Force Court went on to conclude that even though an "experienced advocate" would have recognized and raised the supression issue, "Ineffective assistance of counsel is not judged by the standard of what an experienced advocate would do. Rather, it requires errors so serious that counsel was simply not functioning as counsel" citation omitted. 40 M.J. at 768.

The Court of Appeals, in affirming the findings and sentence, found that the petitioner "failed to show the likelihood of a meritorious motion to suppress the confession as being tainted." 43 M.J. at 438. Judge Sullivan in dissent agreed with the Air Force Court in concluding that the petitioner had met the burden of proving that the confession was tainted but contrary to the Air Force Court concluded that the defense counsel's conduct amounted to ineffective assistance.

---

[1] It is undisputed that Air Force Regulations prohibited the use of evidence derived from a commander-directed urinalysis for disciplinary action under the UCMJ and that this prohibition is grounded in the Fourth Amendment prohibition against unreasonable searches and seizures.

REASONS FOR GRANTING THE WRIT

AIRMAN ALDRICH McCASTLE RECEIVED A FEDERAL CONVICTION AND A BAD CONDUCT DISCHARGE BASED UPON EVIDENCE THAT ANY REASONABLE DEFENSE COUNSEL WOULD HAVE MADE A MOTION TO SUPPRESS

In reaching similar results the two lower Courts relied upon conflicting conclusions for their decisions. The Air Force Court acknowledged that a properly made suppression motion would have resulted in the confession being suppressed but concluded that the standard for ineffective counsel as provided by this Court in *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed.2d 674 (1984) had not been met. The Air Force Court acknowledged this Court's decision in *Kimmelman v. Morrison,* 477 U.S. 365, 106 S.Ct. 2574, 91 L.Ed.2d 305 (1986), that a "single serious error" alone may constitute ineffective assistance but concluded that standard had not been met.

On the other hand, the Court of Appeals for the Armed Forces completely sidestepped the issue by concluding that the petitioner had not met his burden of proving ". . . the likelihood of a meritorious motion to suppress the confession as being tainted" 43 M.J. at 440.

Petitioner submits that by granting this petition this Court will have the opportunity to define the parameters of both *Strickland, supra,* and *Kimmelman, supra.*

CONCLUSION

Judge Sullivan in his dissent notes that "[a]ppellant's confession was *the sole critical piece of evidence* in the prosecution's case; the issue of its admissibility was not clearly lacking in merit," and defense counsel's failure to litigate this question was not explained in strategic terms." *Citation omitted,* 43 M.J. at 440-441.

WHEREFORE, this Court should grant this petition.

Respectfully submitted,

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MAY 1996

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE ARMED FORCES

No. 94-1370

CMR No. S28779

UNITED STATES,

Appellee

v.

ALDRICH C. MCCASTLE, Airman First Class
U.S. Air Force,

Appellant

Argued October 5, 1995

Decided March 1, 1996

OPINION OF THE COURT

GIERKE, Judge:

A military judge sitting as a special court-martial at Robins AFB, Georgia, convicted appellant, contrary to his pleas, of wrongful use of cocaine, in violation of Article 112a, Uniform Code of Military Justice, 10 USC § 912a. The approved sentence provides for a bad-conduct discharge and reduction to the lowest enlisted grade. The Court of Military Review * affirmed the findings and sentence. 40 MJ 763 (1994).

---

* *See* 41 MJ 213, 229 n.* (1994).

We granted review of the following issue:

> WHETHER APPELLANT WAS DENIED THE EFFECTIVE ASSISTANCE OF COUNSEL WHEN HIS TRIAL DEFENSE COUNSEL FAILED TO RAISE A MOTION TO DISMISS THE CHARGE DUE TO THE FACT THAT THE CHARGE WAS BASED DIRECTLY UPON THE RESULTS OF A POSITIVE COMMAND DIRECTED URINALYSIS.

Factual Background

Airman First Class McCastle was ordered to submit to a command-directed urinalysis on November 16, 1992. The test was positive for cocaine. He was interviewed by the Air Force Office of Special Investigations (OSI) and confessed to buying a rock of crack cocaine and using it.

At appellant's court-martial, the prosecution relied on the confession but made no attempt to introduce the positive urinalysis. Defense counsel moved to suppress the confession, but only for lack of corroboration. The prosecution introduced evidence that appellant's confession contained a description of the drug dealer and his car that matched a known drug dealer who did business in the area where appellant said he purchased the cocaine. The military judge ruled that this was sufficient corroboration and admitted the confession.

Before the Court of Military Review, appellant contended that his defense counsel was ineffective because she did not move to suppress the confession as derivative evidence of the command-directed urinalysis, allegedly obtained in violation of paragraph 5-8b, Air Force Regulation 30-2 (19 Aug 1988). This regulation prohibits using evidence obtained by a command-directed urinalysis "in any disciplinary action under the UCMJ." The regulation further provides, however, that "the limitations of

this paragraph on the use of the results do not apply to . . . [d]isciplinary or other action based on independently derived evidence . . . ." Para. 5-8b(2).

In a post-trial affidavit, defense counsel said that her research revealed only one case on point. *United States v. Williams*, 35 MJ 323 (CMA 1992), and that she concluded after studying it that a motion to suppress would not be successful. In *Williams* we considered admissibility of a confession obtained after a command-directed urinalysis and held "that any taint from the command-directed urinalysis . . . was clearly attenuated." We noted that Williams "was not in custody" when he was interviewed by OSI; the interview was 2 weeks after the urinalysis; he was advised of his rights under Article 31, UCMJ, 10 USC § 831; and was specifically told that the results of the urinalysis could not be used against him in a trial. Williams also consented to a second urinalysis *before* being confronted with the results of the command-directed urinalysis. 35 MJ at 328.

The Court of Military Review in this case concluded that *Williams* was sufficiently distinguishable so that "an experienced advocate would have argued that *Williams* does not permit McCastle's confession to be used against him; [and] that the taint from the coerced seizure of McCastle's urine could not be attenuated so as to permit this trial." Nevertheless, the court below held that defense counsel's performance was not so deficient "that counsel was simply not functioning as counsel," 40 MJ at 768—the standard of *Strickland v. Washington*, 466 U.S. 668, 687 (1984). The court below further held that "[h]er belief, however mistaken, that the controlling precedent precluded a motion based on illegally derived evidence does not render her performance of duty legally ineffective." 40 MJ at 768.

Before this Court, appellant has again attacked his counsel's performance, arguing that she was ineffective

because she did not move to suppress the confession as illegally derived evidence.

When a timely motion to suppress is made at trial, the prosecution has the burden of proof. Mil.R.Evid. 311(e)(1), Manual for Courts-Martial, United States, 1984. It must show by a preponderance of the evidence that a confession following an unlawful search and seizure was not obtained as a result of the search and seizure. Mil.R.Evid. 311(e)(2); *United States v. Campbell*, 41 MJ 177, 184 (1994).

On the other hand, when a defense counsel is attacked as ineffective for failing to make a motion to suppress, the burden shifts to appellant to overcome the "strong presumption" that defense counsel was competent. *Strickland v. Washington*, 466 U.S. at 689. Counsel's "performance is to be evaluated from counsel's perspective at the time of the alleged error and in light of all the circumstances, and the standard of review is highly deferential." *Kimmelman v. Morrison*, 477 U.S. 365, 381 (1986). Where the allegation of ineffectiveness is based on failure to make a motion to suppress, appellant must show a reasonable probability that the motion "would have been meritorious." *United States v. Loving*, 41 MJ 213, 244 (1994); *see Kimmelman v. Morrison, supra* at 382.

In this case, appellant was given every opportunity to support his claim of ineffective assistance of counsel. Indeed, the court below admitted the entire OSI report, tendered by appellate defense counsel over government objection. 40 MJ at 764. The report recites that appellant was ordered by his commander to provide a urine sample on November 16, 1992, because appellant was experiencing severe financial problems. On December 3, 1992, the urinalysis tested positive for cocaine. On December 4, 1992, the staff judge advocate (SJA); Robins Air Force Base, Georgia, advised the OSI that appellant

would be administratively discharged as a result of the positive urinalysis. The SJA further advised that his office would prosecute appellant if the OSI obtained a confession that could be corroborated. On December 4, 1992, "SUBJECT was interviewed under rights' advisement" and "admitted to smoking 'CRACK' Cocaine on 14 Nov 92."

From defense counsel's viewpoint, she researched the applicable law and found that the only case on point held against her, so she decided to focus on lack of corroboration. On its face, her decision was not unreasonable in light of the minimal corroboration the Government was able to muster. *See United States v. Molina*, 934 F.2d 1440, 1447 (9th Cir. 1991) (while defense has "everything to gain and nothing to lose" by moving to suppress, it is reasonable to decide not to make an unmeritorious motion); *United States v. Madewell*, 917 F.2d 301, 305 (7th Cir. 1990) (Counsel did not act in an "exceptionally zealous fashion," but his actions were reasonable and within "the bounds of the Sixth Amendment.").

Appellant has failed to show the likelihood of a meritorious motion to suppress the confession as being tainted. Appellant did not submit an affidavit or any evidence regarding the circumstances of his OSI interview, except for the OSI report itself and the OSI interview notes, which say little about the circumstances of the interview. The OSI report and interview notes do not reflect who first mentioned the urinalysis during the interview, the context in which it was mentioned, or whether appellant knew or was told that the positive urinalysis could not be used against him in a criminal prosecution. Whether any taint was attenuated or whether appellant's confession was voluntary and obtained independently of the urinalysis cannot be determined from the evidence submitted by appellant. *See, e.g., United States v. Murphy*, 39 MJ 486 (CMA), *cert. denied*, 115 S.Ct. 582 (1994);

United States v. Marquardt, 39 MJ 239 (CMA 1994). Thus, he has not met his burden of proof. Accordingly, we hold that appellant has failed to overcome the "strong" presumption of competence. *See United States v. Molina*, 934 F.2d at 1447.

The decision of the United States Air Force Court of Military Review is affirmed.

Chief Judge COX, Judge CRAWFORD, and Senior Judge EVERETT concur.

SULLIVAN, Judge (dissenting):

I would reverse the decision of the Court of Military Review and order a rehearing. *See Tomlin v. Myers*, 30 F.3d 1235 (9th Cir. 1994) (found inadequate counsel because of failure to move to suppress pretrial and trial identification because no counsel provided at lineup). Appellant's confession was *the sole critical piece of evidence* in the prosecution's case; the issue of its admissibility was not "clearly lacking in merit," and defense counsel's failure to litigate this question was not explained in strategic terms. *Id.* at 1238, citing *United States v. Molina*, 934 F.2d 1440, 1447 (9th Cir. 1991).

In this case, the confession was obtained only after the OSI told appellant that his command-directed urinalysis tested positive for cocaine. All Air Force defense counsel know or should know about the regulatory prohibition against use of evidence derived from a command-directed urinalysis. *See para.* 5-8b, Air Force Regulation (AFR) 30-2 (19 Aug. 1988) (regulation grounded in the Fourth Amendment). Consequently, a suppression motion should have been made as to this derivative evidence from a command-directed urinalysis (*i.e.*, appellant's confession directly related to the urinalysis is also inadmissible; *see Murray v. United States*, 487 U.S. 533, 536-37, 108 S.Ct. 2529, 2532-33 (1988).

Nevertheless, defense counsel, instead of seeking the obvious suppression motion based on AFR 30-2 and the Fourth Amendment, sought to suppress the confession on an ill-fated motion challenging the lack of corroboration for the confession. Stated another way, the defense counsel saw hoofprints and looked for a rare zebra instead of an obvious horse.

Notwithstanding the good intentions of his defense counsel who focused on the corroboration issue, appellant deserved to have a counsel who would pursue the outcome-determinative motion to suppress based upon the Air Force Regulation. In viewing the law and the facts raised on this appeal, I conclude that appellant has demonstrated a reasonable probability that a suppression motion based on the Air Force Regulation's prohibition would have been granted. *See United States v. Campbell,* 41 MJ 177 (CMA 1994). Accordingly, I would hold that *Strickland v. Washington,* 466 U.S. 469 (1984), would require a rehearing in this case, and I would so order it.

APPENDIX B

UNITED STATES AIR FORCE
COURT OF MILITARY REVIEW

ACM S28779

UNITED STATES

v.

Airman First Class ALDRICH C. MCCASTLE,
FR433-41-6543
United States Air Force

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26 July 1994

Sentence adjudged 28 January 1993 by SPCM convened at Robins Air Force Base, Georgia. Military Judge: James J. Blommers (sitting alone).

Approved sentence: Bad-conduct discharge and reduction to E-1.

Before
HEIMBURG, PEARSON, and SCHREIER
Appellate Military Judges

OPINION OF THE COURT

HEIMBURG, Senior Judge:

Contrary to his pleas, Airman First Class (A1C) McCastle was convicted by military judge, sitting alone, of use of cocaine. Violation of Article 112a, UCMJ, 10 U.S.C. § 912a (1988). His approved sentence is a bad-conduct discharge and reduction to E-1. A1C McCastle has assigned two errors: the military judge erred in failing to suppress his confession for lack of corroboration and his trial defense counsel was ineffective in failing to move to dismiss the charge and specification as illegally derived from a command-directed urinalysis. We find neither asserted error persuasive and affirm.

I. The Case

At trial, the evidence against McCastle consisted solely of the testimony of an agent of the Air Force of Special Investigations (AFOSI) that McCastle orally confessed to buying and using crack cocaine off-base on 14 November 1992. The same AFOSI agent and a deputy sheriff testified as to corroborating evidence.

During appellate review we permitted appellate defense counsel, over objection by appellate government counsel, to file with this Court an AFOSI investigative report concerning McCastle. This report shows that AFOSI agents first approached McCastle because they learned he was reported "positive" on a command-directed urinalysis. McCastle's confession, according to this report, was to the same use of cocaine reflected by the command-directed urinalysis. There is no mention whatsoever of "urinalysis" in the trial transcript.

II. Corroboration of the Confession

McCastle's trial defense counsel moved to suppress his confession on the grounds that there was insufficient cor-

roboration. She argued the corroboration evidence at most identified the vehicle mentioned in the confession and connected that vehicle with Ernest Mace, an alleged drug dealer. It did not corroborate McCastle's confession, she maintained, because no witness put him at the scene or at the same place with Ernest Mace; no evidence corroborated a purchase of cocaine by McCastle; and no evidence supported the conclusion that—assuming McCastle bought crack cocaine—he used it, or even that he purchased it for use.

The military judge did not suppress the confession. He found the corroboration adequate under Military Rule of Evidence (Mil. R. Evid.) 304(g) because it reasonably supported the conclusion that McCastle told the truth at the time he made his statement. We agree with the military judge and adopt his findings of fact. We find the following corroborating evidence persuasive:

> 1. The place where McCastle admitted to purchasing crack cocaine, an apartment house complex, was well known to local law enforcement authorities as a place where crack cocaine was sold during the time period in question: that is, November 1992.
>
> 2. McCastle described the person who sold him crack cocaine as "a large black man" who drove a "red or orange Toyota Celica" with large personalized letters "LOW E" along the side of the body. A man known to local law enforcement authorities as frequently engaged in selling crack cocaine at the apartment house complex, Ernest Mace, met that physical description and frequently drove a red-orange Toyota Celica, the only vehicle in the local area known to have the letters "LOW E" emblazoned along its side. The Celica was registered to Ernest Mace's mother, whose address was the same as that given by Ernest Mace when last arrested.

> 3. Ernest Mace was frequently observed by local law enforcement authorities and AFOSI agents using the red-orange Toyota Celica described above, either as driver or as passenger, to conduct drug sales. In April 1991 Ernest Mace was arrested for sale or distribution of crack cocaine. He pled guilty in September or October 1991 and served a jail sentence. It was his third arrest since October 1990 for drug sale or distribution or possession.

The requirement for corroboration does not mean the prosecution must produce independent evidence of the "corpus delicti" of the confessed offense but only "independent evidence which establishes the trustworthiness of the confession." *United States v. Maio,* 34 M.J. 215, 218 (C.M.A. 1992); *United States v. Rounds,* 30 M.J. 76 (C.M.A. 1990), *cert. denied,* —— U.S. ——, 111 S. Ct. 130, 112 L. Ed. 2d 98 (1990); *United States v. Yeoman,* 25 M.J. 1 (C.M.A. 1987); *United States v. Mitchell,* 29 M.J. 854 (A.F.C.M.R. 1989), *pet. denied,* 31 M.J. 409 (C.M.A. 1990). The quantum of evidence required for corroboration has been described as "slight," *Yeoman,* 25 M.J. at 4, or "very slight." *United States v. Melvin,* 26 M.J. 145, 146 (C.M.A. 1988). We find the corroborating evidence sufficient to establish the trustworthiness of McCastle's confession to purchase and use of crack cocaine on 14 November 1992.

III. Ineffectiveness of Counsel

McCastle asserts his trial defense counsel was ineffective because she failed to move to dismiss the charge as improperly based directly on the results of a command-directed urinalysis.

A claim of ineffective assistance of counsel requires that an appellant establish both incompetence and prejudice. *Strickland v. Washington,* 466 U.S. 668, 104 S.Ct. 2052,

80 L. Ed. 2d 674 (1984); *United States v. Sanders*, 37 M.J. 116, 118 (C.M.A. 1993); *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987). The Court of Military Appeals has reformulated this test into three parts:

> 1. Are the allegations made by appellant true; and, if they are, is there a reasonable explanation for counsel's actions in the defense of the case?
>
> 2. If they are true, did the level of advocacy "fall[] measurably below the performance . . . [ordinarily expected] of fallible lawyers"?
>
> 3. If ineffective assistance of counsel is found to exist, "is there . . . a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt?"

United States v. Polk, 32 M.J. 150, 153 (C.M.A. 1991). We must begin, therefore, by examining the alleged deficiency of McCastle's trial defense counsel. If the allegations are true, but we find "a reasonable explanation for counsel's actions," our inquiry must cease, for McCastle has failed to establish ineffective assistance of counsel.

Our reading of the trial transcript reflects that the allegation made by McCastle is true: his defense counsel did not move either to dismiss the charge or to suppress the evidence of her client's drug abuse as illegally derived directly from the results of a command-directed urinalysis. In an affidavit submitted by appellate defense counsel, Captain S, the trial defense counsel, has given her explanation why:

> I was aware that the OSI interview took place immediately following their notification that the command-directed urinalysis was positive. I considered, during my research of potential issues in

> the case, whether I had any issue to raise relating to the command-directed urinalysis. I discovered that the urinalysis could not be used to corroborate A1C McCastle's admissions. However, I discovered no case law, other than *United States v. Williams*, 35 M.J. 323 (CMA 1992), that addressed the admissibility of the admissions derived from the command-directed urinalysis. As this case appeared to clearly support the admissibility of such evidence, and I could discover no contrary case law, I chose not to raise this as an issue during the court-martial.

Appellate defense counsel argued persuasively that *United States v. Williams*, cited by Captain S, does not support admission of McCastle's confession. They note the regulatory prohibition against use of evidence derived from a command-directed urinalysis contained in Air Force Regulation (AFR) 30-2, ¶ 5-8 (19 August 1988), is grounded in the Fourth Amendment prohibition against "unreasonable searches and seizures." The results of a command-directed urinalysis are not admissible in evidence because the command-directed urinalysis is based on "reasonable suspicion" rather than probable cause and does not fit any of the recognized exceptions to the probable cause requirement of the Fourth Amendment. Mil. R. Evid. 312-314; *See* Editorial Comments on these rules in S. Saltsburg, L. Schinasi, D. Schlueter, MILITARY RULES OF EVIDENCE MANUAL (3d. ed. 1991), pp. 282-87 (Mil. R. Evid. 312), 296-300 (Mil. R. Evid. 313), 324-29 (Mil. R. Evid. 314). Appellate defense counsel argue that in this case, unlike *Williams*, the charge was based on admissions to the same drug use shown by the command-directed urinalysis. They see "no legitimate argument" that the rights advisement given McCastle dissipated the taint of the command-directed urinalysis. Thus, counsel argue, the confession clearly is inadmissible, and Captain S had no rational basis for concluding that the *Williams* case precluded an attack on the charge.

We agree with appellate counsel for McCastle that Captain S may have misunderstood the impact of the *Williams* decision. The facts of that case have some similarities to the present case, but there are striking differences. Because the *Williams* case figures prominently in our discussion of the issue, we will discuss it at some length.

Agents of AFOSI approached A1C Williams, as they did McCastle, because they learned that a command-directed urinalysis he gave before he absented himself without leave tested positive for the presence of a cocaine metabolite. Williams was advised of his rights under Article 31, UCMJ, 10 U.S.C. § 831 (1988), and that he was suspected of a variety of drug offenses. He initially declined to answer questions without a lawyer present but consented to searches of his person, room, urine and baggage. Nothing was found on his person, in his room, or in his baggage, and he said he was unable to provide a urine sample. After the searches, agents readvised him of his rights and questioned him. When he denied using drugs, an agent told Williams they didn't believe him because his prior command-directed urinalysis was positive for a metabolite of cocaine. He responded that the urinalysis could not be used against him for anything but an administrative discharge, which the agents confirmed as true. After further questioning, however, he admitted using cocaine at an off-base party the prior month and during his unauthorized absence earlier that month. Williams provided a urine sample after the interview was over, which tested positive for cocaine metabolite. 35 M.J. at 324-25. Williams pled guilty conditionally after denial of his motion to suppress all evidence showing his guilt.

The question faced by the Court of Military Appeals was whether Williams' admissions to drug use and consent to urinalysis were tainted because the AFOSI inter-

view itself was "based" on his earlier compelled urinalysis. The Court said:

> In resolving this claim, we note that the results of appellant's August command-directed urinalysis were not proffered as evidence of his guilt of the charged September offenses. Instead, appellant seeks to suppress evidence of the charged offenses which was discovered in his interview by police only after they were informed of the earlier positive results. In this regard, we note the words of the Supreme Court in *United States v. Ceccolini*, 435 U.S. 268, 276, 98 S. Ct. 1054, 1060, 55 L. Ed. 2d 268 (1978):
>
> > Even in situations where the exclusionary rule is plainly applicable, we have declined to adopt a "*per se* or 'but for' rule" that would make inadmissible any evidence, whether tangible or live-witness testimony, which somehow came to light through a chain of causation that began with an illegal arrest. *Brown v. Illinois*, 422 U.S. 590, 603, 95 S. Ct. 2254, 2261, 45 L. Ed. 2d 416 (1975).
>
> Accordingly, to the extent that appellant's targeting argument rests solely on a "but for" analysis, we must reject his claim.
>
> Nevertheless, appellant also suggests that his decisions to consent to a second urinalysis and to make incriminating statements were more substantially "connected" to the earlier command-directed urinalysis. He implies that his decisions to cooperate with the AFOSI were a direct product of or tainted by the earlier command-directed urinalysis. We disagree.

35 M.J. at 328. The Court concluded by noting five factors which, in its view, "clearly attenuated" any taint from the command-directed urinalysis: Williams was not

in custody when interviewed some two weeks after the command-directed urinalysis; prior to interview, he was fully advised of his rights under Article 31 and of the drug crimes he was suspected of; he gave consent to submit a urine sample before being confronted with the results of his earlier, command-directed, test; prior to his admissions he was re-advised of his rights under Article 31; and, although he was told of the results of his command-directed urinalysis, he informed agents, and they agreed, the results of that test could not be used against him except for administrative discharge proceedings. *Id.* at 328.

The allegation of ineffectiveness rests on Captain S's interpretation of the *Williams* decision. McCastle asserts that her mistaken belief that *Williams* precluded an attack on the charge led her to deprive him of adequate representation and fell below the minimum standard of competency for defense counsel. Apart from this issue, we conclude, no reasonable argument could be made that Captain S was less than an able and effective advocate.*

Captain S, in her affidavit, asserted that she researched the caselaw and found the *Williams* decision and no other precedent on the issue of admissibility of admissions derived from command-directed urinalysis. We do not fault her research, for we have found no other military case on this point, either. However, we are not persuaded Captain S properly understood the precedential value of the *Williams* case, either as to its facts or its holding.

We do not have a record of the facts surrounding McCastle's interrogation because the issue was not litigated

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* We have not ignored McCastle's allegation that Captain S also erred in failing to attack the legal basis of the command-directed urinalysis itself—*i.e.*, that it was not based on "reasonable suspicion" of drug abuse. This is not a separate allegation of ineffectiveness, for it also depends on argument that taint from the coerced evidence (the urinalysis result) rendered McCastle's later confession inadmissible.

at trial. Thus, we do not know what offense AFOSI agents told McCastle he was suspected of, or whether they told him that the results of his command-directed urinalysis could not be used against him. Nevertheless, we do know that McCastle, unlike Williams, was tried for the same use of drugs which the command-directed urinalysis discovered.

As for the law, some of the language in *Williams* indicates to us that this factual distinction may be of critical importance. The Court of Military Appeals, in discussing the effect of AFR 30-2's prohibition against use of the results of a command-directed urinalysis said this:

> Its prohibitions on use of command-directed urinalysis results are specifically limited. It only precludes use of the results "in any disciplinary action under the UCMJ" or "in separation proceedings" and leaves open the possibility of their use for other law enforcement purposes. It simply does not expressly prohibit OSI or any other police authority from interviewing a servicemember who has come up positive on a command-directed analysis about the circumstances of his drug involvement. In any event, it clearly does not confer upon a servicemember *de facto* or *de jure* immunity for *future* drug offenses which might come to the attention of military authorities as an *indirect* result of an earlier command-directed urinalysis.

35 M.J. at 326 (emphasis supplied).

We thus see enough distinction in the facts of this case to believe an experienced advocate would have argued that *Williams* does not permit McCastle's confession to be used against him; that the taint from the coerced seizure of McCastle's urine could not be attenuated so as to permit this trial.

Nevertheless, an error in understanding legal precedent is hardly the stuff of which ineffective assistance of coun-

sel is made. Ineffective assistance of counsel is not judged by the standard of what an experienced advocate would do. Rather, it requires errors so serious that counsel was simply not functioning as counsel—*Strickland v. Washington*, 466 U.S. 668, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984); *United States v. Sanders*, 37 M.J. 116, 118 (C.M.A. 1993); *United States v. Scott*, 24 M.J. 186, 188 (C.M.A. 1987)—errors so great that there is no "reasonable explanation" for counsel's actions. *Cf. Polk*, 32 M.J. at 153. The Supreme Court has stated that "a single, serious error" by a defense counsel may be so great that it undermines the reliability of the trial process and results in ineffective assistance of counsel. *Kimmelman v. Morrison*, 477 U.S. 365, 383, 106 S. Ct. 2574, 2581, 91 L. Ed. 2d 305 (1986). In *Kimmelman*, however, the trial defense counsel failed to conduct any discovery whatever and, as a result, was unaware of a potential suppression motion and forfeited it by failing to raise it within a prescribed time before trial. *Id.* at 385. The Supreme Court said "the failure to file a suppression motion does not constitute *per se* ineffective assistance of counsel . . .," but agreed counsel was ineffective because of his "total failure to conduct pre-trial discovery . . . [for] which counsel offered only implausible explanations." *Id.* at 385, 386.

We do not find ineffective assistance of counsel here. Captain S performed the functions of a trial defense counsel. She investigated the facts—as shown by her suppression motion based on lack of corroboration—and researched the law. Her belief, however mistaken, that the controlling precedent precluded a motion based on illegally derived evidence does not render her performance of duty legally ineffective.

After examining the record of trial, the assignment of errors, and the government's reply, we conclude that the findings and sentence are correct in law and fact, the

sentence is appropriate, and no error prejudicial to the substantial rights of the accused occurred. Accordingly, the findings of guilty and sentence are

AFFIRMED.

Judges PEARSON and SCHREIER concur.

[Court Seal]

OFFICIAL

/s/ Al J. Stribling
ALVIN J. STRIBLING
Technical Sergeant, USAF
Chief Court Administrator, AFCMR

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